Prosecution of Genocide in National Courts

A. Introduction

On the basis of the 1948 Convention on the Prevention and the Punishment of the Crime of Genocide, perpetrators of genocide must be prosecuted by the courts of the state where the crime took place or by a competent international criminal court. \( ^{401} \) Whereas various international criminal courts have emerged to prosecute the crime, it remains the duty of states to prosecute international crimes. \( ^{402} \)

In recent years, Rwandan national courts have engaged in prosecution of the atrocious human rights abuses committed in Rwanda. \( ^{403} \) The prosecution of genocide, crimes against humanity and war crimes was organised in accordance with three international conventions, to which Rwanda is a signa-
Chapter Four: Prosecution of Genocide in National Courts

tory, that is, the 1948 Genocide Convention on Prevention and Punishment of Genocide, the 1949 Geneva Convention on the Protection of Civilian Persons in Time of War and the 1968 Convention of the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity.\textsuperscript{404} This chapter explores the current practice and developments in the prosecution of core crimes at the national level.\textsuperscript{405}

B. Generalities on Rwanda National Courts

I. Genesis of Genocide Prosecutions

The 1994 genocide devastated the justice system in Rwanda. Most judges, prosecutors and lawyers fled the country or were killed. Courts, records, and all types of equipment were destroyed or looted.\textsuperscript{406} At the same time, there was a dire need for well-trained investigators and judges in order to investigate what had happened and render justice to victims and perpetrators.

In 1995, the government convened an international conference in order to develop ideas for dealing with the tens of thousands of suspects, approximately over 120,000 in prisons.\textsuperscript{407} The idea of setting up a special court was


\textsuperscript{405} It is important to note that the 1996 Organic Law did not distinguish Genocide and Crimes against Humanity; it covered the crimes as if it was one group. However, in 2003, Art. 2 of Law N° 33bis/2003 was cited virtually identical to Art.II of the Genocide Convention. The only difference is that it adds regional groups as protected groups. See Law N° 33bis/2003 of 6 June 2003 repressing the Crime of Genocide, Crimes against Humanity and War Crimes, O.G.R.R. N° 21 of 1 November 2003.


rejected but instead specialised chambers were established in ordinary and military courts to deal with the crimes related to genocide.\textsuperscript{408}

In 1996, while still short of some necessities, the government, with the support of international donors, had managed to provide most of its legal personnel with the required minimum of necessities, such as equipment, furnishings, and a decent work place.\textsuperscript{409} Towards the end of 1996, national courts began prosecuting genocide suspects.

II. Organisation of Ordinary Courts

To begin with, this study shows how Rwandan law was wholly unequipped for the situation after the genocide.\textsuperscript{410} Rwandan domestic law in 1994 did not provide for the crime of genocide despite the fact that Rwanda had acceded to the Genocide Convention in 1975.\textsuperscript{411} As in many other countries, the Genocide Convention cannot be applied directly in domestic law and in order to fully operate, it needs to be completely implemented into national law.\textsuperscript{412}

\begin{itemize}
\end{itemize}
In a bid to plug this gap, and given the overwhelming demands created by the genocide and the ensuing arrests of thousands of suspects, the legislative national assembly passed a law in 1996 creating specialized chambers within the first instance courts to try people accused of genocide. The chambers were competent to try genocide, crimes against humanity, and war crimes. To avoid retroactivity, the organic law did not introduce new crimes but based its prosecutions on ordinary crimes in the penal code which were carried out in relation to the events surrounding the genocide or the crimes against humanity committed. Such crimes included murder, inflicting physical injury, rape, deprivation of liberty as well as theft and other offences against property.

The organic law established four categories based on the accused’s acts during the conflict, which formed a basis for determining the penalties. The penalties ranged from imprisonment to the death penalty until its abolition in 2007. Articles 14 and 17 of the 08/96 organic law give detailed provisions of the sentencing regime of the ordinary courts where the highest penalty was death penalty for those falling under Category One. Persons whose acts placed them in category Two were liable to life imprisonment.

413 Organic Law N° 08/1996 of 30 August 1996 on the Organization of Prosecutions for Offenses Constituting the Crime of Genocide or Crimes against Humanity.
415 The Penal Code however did not expressly punish genocide or crimes against humanity but the courts instead relied on ordinary crimes committed with genocidal intent.
Acts committed by persons placed in Category Three would give rise to varying imprisonment terms, whereas Category Four crimes led to civil damages.

The organic law further described the confessions procedure, which offered defendants a reduced sentence in return for a detailed account of the offences committed.\(^{419}\) However confession and guilty plea was only applicable and beneficial to Category Two and Three defendants which would lead to a substantial reduction of the sentences they would normally receive.

Organic law N\(^\circ\) 08/96 was repealed in 2004 in the context of the reform of the Gacaca system.\(^{420}\) Subsequently, national trials were governed by general criminal law as complemented by the specific provisions of the Gacaca law which will be discussed in the chapter on Gacaca. The Gacaca law significantly reduced the caseload for the ordinary courts which remained with only Category One suspects after merging the categories and extending the competence of the Gacaca courts to deal with Category Two and Three suspects.\(^{421}\) Some of vital elements in the 1996 organic law were retained in the Gacaca laws, mainly the confession procedure and the categorization of suspects according to the gravity of their crimes.\(^{422}\)

The temporal jurisdiction of the ordinary courts covered the period from the beginning of the civil war in October 1990 to the end of December 1994. This chapter discusses genocide trials by national courts that took place both before and after the reform.\(^{423}\)

III. Reparations

Specialised chambers were given competence to hold trials for victims’ reparations in criminal trials.\(^{424}\) The 1996 organic law provided that con-

\(^{419}\) Art. 6, of the Organic Law N\(^\circ\)08/1996 of 30 August 1996.
\(^{421}\) Categories were merged and reduced to only three depending on the gravity of committed crimes i.e Category one, two and three were established.
\(^{423}\) The reform in genocide trials came with the introduction of Gacaca courts.
\(^{424}\) For a detailed discussion on reparations in Rwanda, see P.C. Bornkamm, \textit{Rwanda’s Gacaca Courts: Between Retribution and Reparation}, (2012), at 132 \textit{et seq}.
victed persons whose acts placed them within Category One would be held liable for all damages caused in the country by their acts of criminal participation, regardless of where the offences were committed. Persons, whose acts placed them within other categories, were to be held liable for damages for the criminal acts they committed, hence civil responsibility for criminal acts.\footnote{Art. 30 Organic Law N° 08/1996 of 31 August 1996 on the Organization of Prosecutions for Offenses constituting the Crime of Genocide or Crimes against Humanity committed since 1 October 1990.} However, practice shows that the reparation of victims was less effective as will be discussed in the course of this study. Apart from limited property reparations for Category Three crimes in Gacaca, many victims did not receive reparations for violent crimes committed by perpetrators in other categories, particularly those tried by ordinary courts.\footnote{For a detailed discussion on reparations in Rwanda, see P.C. Bornkamm, Rwanda’s Gacaca Courts: Between Retribution and Reparation, (2012), at 131 and 133 \textit{et seq}.}

Therefore organic law of 08/96 did not properly address the issue of compensation for victims. Judges relied on the law of damages and especially on Article 258 of the Civil Code, Book III. However, it quickly became apparent that assessing damages for genocide victims was not an easy task for judges. Judgments were condemning peasant suspects to pay millions of Rwandan Francs as compensation with no reasonable expectation that payment would materialise.

In fact, compensation was only awarded to a minimal number of victims. This was due to the fact that most victims did not know of their rights to compensation, or sometimes were not able to prove their relationship with their deceased relatives. Even in the case where the suspects and the State of Rwanda were sued simultaneously, the State was never represented before the courts in many cases. Judges were obliged to condemn the State to pay damages by default judgment in order to cover judicial damages to victims but which in practice has not been executed.\footnote{Le Verdict, News paper, No 01, 15 April 1999, at15 \textit{et seq}.}

\textbf{C. Status of Case Law within the Ordinary Court System}

In 1996, there were only thirteen courts of first instance in the country, each with a specialised chamber to try genocide crimes in Rwanda from all the
four categories of suspects. Out of the 120,000 people awaiting trial in the prisons, the courts managed to accomplish 7,181 cases between December 1996 and June 2002. And by the end of 2004, a total of 10,026 individuals had been tried by the ordinary courts. So, the task was still daunting given that the courts had to deal with daily ordinary cases too. However, when Gacaca courts started trials in the pilot phase in 2005, ordinary courts continued prosecuting only Category One genocide cases, but at a significantly lower rate and no longer by the specialised chambers. From January 2005 to March 2008, the courts merely tried 222 genocide cases. 

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430 B. Ingelaere, ‘The Gacaca Courts in Rwanda,’ in L. Huyse and M. Salter (eds.), Traditional Justice and Reconciliation after Violent Conflict: Learning from African Experiences, (2008), at 45; Schabas also estimated that around 10,000 cases were dealt with by the end of 2004, see W.A. Schabas, ‘Genocide Trials and Gacaca Courts,’ 3 Journal of International Criminal Justice, (2005), at 888.

431 Gacaca trials were initially conducted in 752 pilot cells but from 15 July 2006, trials were held in over 9,000 cells throughout the whole country.

432 In 2002, Amnesty International reported that with exception of Category 1 cases that still remained under the exclusive jurisdiction of ordinary courts, all other suspects were transferred to the jurisdiction of Gacaca courts. However, by 2008, about 9,000 cases, amounting to over 90% of all remaining Category I cases were also transferred to Gacaca courts as a result of the 2008 Amendment, Para. 7. Around 1,000 suspects remained under the jurisdiction of ordinary courts. See Rwandan Development Gateway, ‘Gacaca Courts to get more powers’ 7 March 2008, available at <http://www.rwandagateway.org/Art...php3?idArt.=8283>, accessed November 2011.

433 Art. 96(1) of Organic Law No° 40/2000. The Specialized Chambers competent for genocide trials under Organic Law No° 08/96 were repealed; see Arts.2 and 96 of 2001 Gacaca Law.
suspects. Thus, the total number of persons tried for genocide-related crimes in Rwanda’s ordinary courts from December 1996 to March 2008 was 10,248. After March 2008, very few genocide trials were heard in ordinary courts since most of the cases had been transferred to Gacaca courts to reduce the caseload. With this alternative model, a few accused remained to be prosecuted by the ordinary criminal courts for category one offences, while the rest of the backlog in Category Two and Three was to be tried by the community in Gacaca. For statistics of all genocide trials that took place from 1996 to 2012, the Rwandan ministry of justice provides a total of 15,286 genocide cases that were handled by the ordinary courts in Rwanda.

D. Analysis of the National Court Case Law

Currently, within the national court system of Rwanda, the alleged leaders and high profile perpetrators of the genocide are tried in either the ordinary courts or military tribunals, based on the territoriality and nationality of the accused.

434 According to Human Rights Watch, 62 persons were tried by ordinary courts in Rwanda in 2005, then 73 persons were tried in 2006, more 83 persons were tried in 2007, and 4 persons were tried in the first quarter of 2008. See statistics compiled by the ‘Supreme Court of Rwanda, Urukiko rw’Ikirenga, ‘Raporo y’Urwego rw’Ubucamanza 2006, 2007, and 2008.

435 See Arts.2 and 51 of the 2004 Gacaca Law as modified by Arts. 1 and 9 of Organic Law N° 13/2008; Also any genocide cases transferred to Rwanda from the ICTR or a third states were to be prosecuted in ordinary courts whereas low profile suspects in Rwanda were tried by Gacaca. However, after the closure of Gacaca courts, on 18 June 2012, new genocide cases are to be prosecuted by ordinary courts irrespective of the category of suspects.


438 Ordinary court system comprises of Primary courts, Intermediate courts, High court of the Republic and then the Supreme Court which is the highest court of jurisdiction that mainly deals with genocide cases on appeal level.
principles of jurisdiction.\textsuperscript{439} The Supreme Court is the highest court of jurisdiction that has competence to deal with appeal cases from both the high court of the republic\textsuperscript{440} and the military high court.\textsuperscript{441} The discussion below will thus assess a number of these genocide cases that reached the jurisdiction of the Supreme Court on the second appeal, in order to reveal some of their strengths and weaknesses. The author selected leading cases that were before the Supreme Court of Rwanda.

\textit{Table showing an Overview of Genocide Trials within the Supreme Court}

<table>
<thead>
<tr>
<th>ACCUSED</th>
<th>SUMMARY OF ACCUSATIONS</th>
<th>DATE AND JUDGMENT</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 Cpt Twagiramungu Theophile</td>
<td>Planned and incited interahamwe to kill Tutsis, non-assistance of persons in danger, and criminal group formation.</td>
<td>24/02/2006: Overturned the previous death penalty and was acquitted on appeal.</td>
</tr>
<tr>
<td>2 Gataza Noel</td>
<td>Murder of many people, torture, dehumanizing acts, and violent crimes resulting in death of many Tutsis.</td>
<td>12/01/2007: Same imprisonment of 30 years as the previous court but was to pay higher reparations of 57.117.296 FRW.</td>
</tr>
</tbody>
</table>

\textsuperscript{439} R. Cryer \textit{et al.}, \textit{An Introduction to International Criminal Law and Procedure}, (2007), at 40.


\textsuperscript{441} Crimes committed by military personnel are tried by the Military Tribunal and appealed before the Military High Court. An appeal or second appeal can be lodged with the Supreme Court, Art. 137(2), 138(2), 140 of Organic Law N° 51/2008, Art. 43(2) of Organic Law N° 01/2004 as modified by Art. 3 of Organic Law N° 58/2007.
<table>
<thead>
<tr>
<th>ACCUSED</th>
<th>SUMMARY OF ACCUSATIONS</th>
<th>DATE AND JUDGMENT</th>
</tr>
</thead>
<tbody>
<tr>
<td>Gatorano Didace</td>
<td>He was in position of authority, supervised and led criminal attacks, notorious murderer, and looting.</td>
<td>12/01/2007: The case was inadmissible on appeal in the Supreme Court but the prior court had sentenced him to death penalty.</td>
</tr>
<tr>
<td>Gd Anne Marie Nyirahazimana and Ngirinshuti Athanase</td>
<td>Instigated others, committed and encouraged genocide, gave orders to kill, complicity, aiding and abetting, voluntary destruction of Tutsi houses, criminal group formation, promoting divisions, and violation of domicile.</td>
<td>27/06/2008: On appeal, the case was sent to Gacaca appeal court yet previously he had been sentenced to death penalty and reparations.</td>
</tr>
<tr>
<td>Harelimana Etienne, Rudodo Joseph, Mutabaruka Joseph, Harindwintwali Antoine and Bimenyimana Emmanuel</td>
<td>Genocide in Butare, systematic attacks and violent crimes resulting in death of Tutsis in the Southern Province.</td>
<td>20/06/2008: Inadmissible case on appeal but the prior court had sentenced Harelimana and 3 others to death while Bimenyimana to life imprisonment.</td>
</tr>
<tr>
<td>Nzikabatinyi Felecien</td>
<td>Torture, notorious murderer, looting, participated in attacks and committed violent crimes resulting in deaths.</td>
<td>18/04/2008: Same sentence of life imprisonment as the former appeal court.</td>
</tr>
<tr>
<td>Nzisabira Jean Baptiste</td>
<td>Murder of many Tutsis, dehumanising acts, and participated in criminal attacks.</td>
<td>04/05/2007: Overturned life sentence to 19 years sentence on appeal.</td>
</tr>
<tr>
<td>Pandasi, Bugeri J. Baptiste and Nzajyibwami Eugene Alias Gahini</td>
<td>Committed various genocide acts leading to deaths of several Tutsis and moderate Hutus in the Northern Province (Ruhengeri).</td>
<td>17/04/2006: Application for review of judgment was inadmissible while the earlier court had sentenced Pandasi and Bugeri to death then life imprisonment to Nzajyibwami.</td>
</tr>
<tr>
<td>Rurangirwa Hycinthe, Bimenyimana and Ntawanganyeza</td>
<td>Criminal group formation, destruction of Tutsi houses, rape, sexual torture, unlawful gun possession, non assistance of persons in danger.</td>
<td>20/06/2008: The case was inadmissible on appeal but the prior court had sentenced them to death penalty and deprival of civil liberties.</td>
</tr>
<tr>
<td>ACCUSED</td>
<td>SUMMARY OF ACCUSATIONS</td>
<td>DATE AND JUDGMENT</td>
</tr>
<tr>
<td>-------------------------</td>
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</tr>
<tr>
<td>Sibomana J.M Vianney</td>
<td>Committed genocide and other crimes against humanity with a particular zeal.</td>
<td>13/06/2008: Inadmissible on appeal but before he had been sentenced to death and reparations of Frw 42,527,900.</td>
</tr>
</tbody>
</table>

**RELEVANT CASES WITHIN THE SPECIALIZED CHAMBERS PRIOR TO ESTABLISHMENT OF GACACA**

<table>
<thead>
<tr>
<th></th>
<th>Case</th>
<th>Date and Judgment</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Banzi Wellars <em>et al.</em>, Genocide within the Western Province (Gisenyi)</td>
<td>25/05/2001: Death sentence and reparations.</td>
</tr>
<tr>
<td>2</td>
<td>Hanyurwimfura Epaphrodite, Genocide within the Southern Province (Butare)</td>
<td>08/08/2001: Not guilty.</td>
</tr>
<tr>
<td>3</td>
<td>Kalisa Ignace <em>et al.</em>, Genocide within the Northern Province</td>
<td>31/01/2002: Not guilty.</td>
</tr>
<tr>
<td>4</td>
<td>Karorero Charles <em>et al</em>, Genocide within the Western Province (Cyangugu)</td>
<td>31/03/2000: Death and loss of civic rights.</td>
</tr>
<tr>
<td>5</td>
<td>Muzatsinda Emmanuel, Genocide within Kigali (Kigali City)</td>
<td>17/03/1998: Inot guilty.</td>
</tr>
<tr>
<td>6</td>
<td>Mvumbahe Denys, Genocide within the Western Province (Kibuye)</td>
<td>16/07/2000: Life sentence and loss of civic rights.</td>
</tr>
<tr>
<td>7</td>
<td>Nyilishema Andre, Genocide within Kigali Province (Nyabisundu)</td>
<td>14/11/1997: Life imprisonment but the case was inadmissible on appeal.</td>
</tr>
<tr>
<td>8</td>
<td>Sibomana J.B <em>et al.</em>, Genocide within the Southern Province (Gitarama)</td>
<td>08/04/2002: Not guilty.</td>
</tr>
<tr>
<td>9</td>
<td>Ukezimfura Jean, Genocide within the Eastern Province (Kibungo)</td>
<td>29/09/2000: 9 years imprisonment.</td>
</tr>
</tbody>
</table>
As is apparent from the above cases, various defendants were sentenced to capital punishment but Rwanda carried out executions of only 22 convicts. The abolition of the death penalty abolition in 2007 meant that people sentenced to death were spared to serve life imprisonment. Therefore, the analysis below will focus on these cases from various trial courts that reached the the Supreme Court on their second appeal, and where applicable, references will be made to related cases by the specialised chambers in ordinary and military courts which tried genocide cases prior to the establishment of Gacaca courts.

I. Prosecutor versus Captain Twagiramungu

The case started from the military court in Kigali where the defendant was acquitted on all the prosecution’s charges of planning genocide, non-assis-
tance to persons in danger,\textsuperscript{447} formation of a criminal group and inciting Interahamwe to kill Tutsis and moderate Hutus.\textsuperscript{448} The lawyer for the civil parties appealed against the decision but the prosecution did not appeal. The military high court then found the defendant guilty and sentenced him to the death penalty and deprival of all civil liberties.\textsuperscript{449} In regard to the civil claim, the defendant was to pay to the victims an amount of 142,000,000 Rwandan francs (RWF), equivalent to (215,151 USD).

The convict was not content with the first appeal decision and as a right, he appealed to the court of cassation for cancellation of the decision. However due to modifications of laws and the competency issues related to the other courts, the matter was referred to the Supreme Court.\textsuperscript{450} Both the defendant and victims were present and represented by their lawyers as well as the prosecution. The defendant’s request was also in compliance with the procedures of appeal.\textsuperscript{451} This law gave the right to convicted persons to request for cassation of the judgment in case they had been sentenced to death penalty on appeal although they had been acquitted at first instance.\textsuperscript{452}

\textsuperscript{447} See Arts. 256 of the Rwandan Penal Code which imposes an obligation on every Rwandan citizen to provide assistance to persons in danger where it would not cause risk to oneself, and failure to do so is a criminal offense.

\textsuperscript{448} Art. 2 and 25, Organic Law N° 08/1996 of 31 August 1996 on the Organization of Prosecutions for Offenses constituting the Crime of Genocide or Crimes Against Humanity; Art. 256, Arts.281, 282 and 283 of the 1977 Penal Code.


\textsuperscript{450} Before the judicial reform in 2004, the Supreme Court was made up of several chambers: the Department of Courts and Tribunals, the Court of Cassation, the Constitutional Court, the Council of State, and the Public Accounts Court, but reform removed some departments like court of cassation and merged others. For details, see W.A Schabas and M. Imbleau, \textit{Introduction to Rwandan Law}, (1997), at 23.

\textsuperscript{451} Art. 25 of the Organic Law N° 08/1996 of 31 August 1996 on the Organization of Prosecutions for Offenses constituting the Crime of Genocide or Crimes Against Humanity.

\textsuperscript{452} Urukiko rw’Ikirenga, Icyegeranyo cy’Ibyemezo by’Urukiko rw’Ikirenga, Imanza za Jenocide iz’Ibyaha byakozwe n’Abana n’iz’Inshinjabyaha, (2006).
Like in the cases of Hanyurwimfura, Kalisa, Muzatsinda, and Sibomana trials before the specialized chamber,\textsuperscript{453} Twagiramungu was acquitted by the Supreme Court which ordered the immediate removal of former charges and sentence.

Just like the norm in ordinary courts, the case demonstrates that criminal appeals can be lodged by any party to the conflict, that is, the defendant, a civil party and the prosecution.\textsuperscript{454} The case is important because it demonstrates observance of the rights of defendants, where Twagiramungu appealed and was consequently acquitted by the Supreme Court despite the prior death sentence pronounced on the defendant.

Though Twagiramungu was not subjected to any prison term, the case reveals facts about the death of the Tutsi during the genocide and the high participation of the militia, civilians and soldiers which is significant for history studies. In analysing the case law, it is noted that the national court trials do not generally deal with legal issues, but rather focus mostly on factual issues which nevertheless provide an insight into the dynamics of the genocide.\textsuperscript{455}

II. Prosecution versus Private Gataza

Gataza was accused of various genocide crimes between April and July 1994,\textsuperscript{456} and the first court sentenced him to death and to pay reparations of

\begin{itemize}
\item Urukiko rw’Ikirenga, Icyegeranyo cy’Ibyemezo by’Urukiko rw’Ikirenga, Imanza za Jenocide Iz’Ibyaha Byakozwe n’Abana n’iz’Inshinjabyaha, (2006).
\item Biteganywa n’Amasezerano Mpuzamahanga y’Umuryango w’Abibumbye yo kuwa 9/12/1948. Arts. 312, 281, 282, 283, 24, 89, 90, 91, the 1977 Rwanda Penal Code and Organic Law N° 08/1996 of 31 August 1996 on the Organization of Prosecutions for Offenses constituting the Crime of Genocide or Crimes Against Humanity.
\end{itemize}
57,117,296 RWF (86,541 USD) to victims. Then he appealed to a higher court and was sentenced to 30 years and reparations of 5,000,000 RWF (7,575 USD) to be paid jointly with the government of Rwanda. Not satisfied with the decision, the defendant and the prosecution as well as the civil claimant Muhimpundu Lillian appealed the decision.

The Supreme Court retained the sentence of 30 years’ imprisonment and the amount of reparations was 57,117,296 FRW (equivalent to 86,541 USD) as had been prescribed by the first court and was to be jointly paid with the Rwandan government. With this judgment, all parties lost their demands, for instance the prosecution lost its demand for a heavier sentence, while the defendant remained guilty and the civil plaintiff did not get the whole amount of reparations claimed.

However due to extreme poverty in Rwanda, reparations are often not paid in practice. Though each case had to always identify the property of the defendants in order to cover any claims for reparations, there is often no available property or too little of it to compensate the victims. Of course, there can be no enough reparation for the value or loss of a loved one, apart from symbolic payments as mentioned by the judges in this case, where they emphasized that reparations should be claimed and accorded in accordance to the country’s economy.

To be allocated reparations, there is need to sue for them and the court has to examine whether the complainant merits them. Simply put, without a civil case, no reparations are made as manifested in this case of Gataza where

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458 Prosecution v. Gataza Noel (RPA/GEN 003/04/HCM), judgment of 05/10/2005.
460 For details see, Icyegeranyo cy'Ibyemezo by’Urukiko rw’Ikirenga, Imanza z’Inshinjabyahana n’iza Jenocide (2007), Ubushinjacyaha na Gataza Noel, Urupapuro 1-11.
462 Similarly, see Prosecutor v. Pandasi, et al., (RS/Rev 0007/06/CS). In this case, it is indicated that Nzajyibwami had only two goats while Pandasi and Bugeri J. Baptiste had no property at all.
Mukamurenzi was not allocated compensation despite the fact that the defendant had killed her husband, yet other victims were entitled to reparations. Even so, there is always need for victims to show the link and loss suffered to be entitled to reparations.\footnote{See also C. Tomuschat, ‘Reparation for Victims of Grave Human Rights Violations,’ 10 \textit{Tulane Journal of International and Comparative Law}, (2002), at 168.}

This jurisprudence is significant because it shows Rwanda’s responsibility for genocide which in most cases is a state-sponsored crime organized by governments. The failure of the state to observe its duty to protect the citizens\footnote{Following the Rome Statute of the International Criminal Court (ICC Statute), The ICTY and ICTR Statutes, The four Geneva Conventions, The 1948 Genocide Convention, The Universal Declaration of Human Rights Conventions, and The International Covenant on Civil and Political Rights; all these instruments recognise the rights of innocent people to be free from atrocities conducted either in armed conflicts or under more covert circumstances where states lend support to illegal acts or crimes, or at times are unable and unwilling to protect their population from such occurrences.} may lead to payment of damages or reparations for the victims as seen in Gataza’s case. Though the government was reluctant to comply with these judgments, this case indicates that the state and the accused were liable \textit{in solidum} to pay damages, accepting the state’s general responsibility for the genocide.\footnote{The government had given up the idea of individualized compensation awards by courts and was now rather inclined towards a solution involving administrative compensation distributed by a fund, P.C. Bornkamm, \textit{Rwanda’s Gacaca Courts: Between Retribution and Reparation}, (2012), at 155 \textit{et seq}.}

Actually, the government of Rwanda, through the minister of justice has always stated that the government did accept political responsibility for the genocide, but not criminal liability for the genocide because the current government did not commit genocide but instead took the political responsibility of the government it replaced.\footnote{Minister of Justice, Tharcisse Karugarama, interview with F. Kimenyi, ‘Rwanda should celebrate Gacaca legacy-Karugarama,’ \textit{The New times}, on the 18, June 2012.} It is noted that the crime of genocide against a protected group can be the responsibility of a state or state-like organization.\footnote{See G. Werle, and B. Burghardt, ‘Do Crimes against Humanity Require the Participation of a State or a “State-like” Organisation?’ 10 \textit{Journal of International Criminal Justice}, (2012), at 1158 \textit{et seq}; see Art. 6 of the ICC Statute.}

Another contribution of this case, at least at the level of domestic law enforcement, is the ruling made by the judges where the prosecution accused the defendant of command responsibility, but the judges acquitted him of
this responsibility because the prosecution failed to establish the power of influence or control that Gataza had on the alleged surbodinate known as Innocent, who had killed Tutsi during the genocide. The Prosecution also failed to prove that Innocent had killed the victims because of obeying orders. The court was hence unable to find that the defendant knew or should have known about the acts of the alleged surbodinate.

III. Prosecutor versus Corporal Gatorano

The prosecution accused Gatorano of killing a large number of Tutsis during the genocide and of various other crimes in furtherance of the genocide plan.\textsuperscript{468} And on the 17 November 2001, the first instance hearing found the defendant guilty and sentenced him to death.\textsuperscript{469} On his first appeal, the court upheld the same death sentence and thereafter he took the matter to the court of cassation for re-examination. However following modifications in the law, the matter was referred to the Supreme Court which declared the appeal inadmissible.\textsuperscript{470}

The inadmissibility of the case was due to the violation of the procedural requirements stipulated in Article 25 of the 08/96 organic law which only allowed defendants to submit their case to the court of cassation, and only if the defendant had received death penalty on appeal while the first court had declared the suspect innocent. This was not the case with the defendant in question because the first appeal court simply confirmed the death sentence as had been ruled by the previous court. So the judges found that the case was not in the competence of the court and consequently could not be examined by the Supreme Court which then had jurisdiction over cases that

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{468} Art. 2 Organic Law N° 08/1996 of 31 August 1996 on the Organization of Prosecutions for Offenses constituting the Crime of Genocide or Crimes against Humanity; Arts.89, 90, 911, 312, 317 of the 1977 Rwanda Penal Code.
\item \textsuperscript{469} As already noted, death sentences were converted to life imprisonment sentences with special provisions. Life imprisonment with special provisions was challenged before the Supreme Court of Rwanda in 2008, but was found not to be unconstitutional.
\item \textsuperscript{470} Prosecutor v. Gatorano Didace on the 17/11/2001 (lower court), 07/1/2002 (higher court), 01/06/2007 (Supreme Court).
\end{enumerate}
\end{footnotesize}
were previously handled by the Cassation court that was no longer in existence.\textsuperscript{471}

Therefore, this judgment shows the defendant’s ignorance about procedural and substantive matters since he did not have legal counsel. For this reason, since 1997, Amnesty International often criticized the fact that state-funded counsel was not made available to defendants.\textsuperscript{472} Although ignorance of the law is no excuse, this has been manifested in various cases, in the form of making late appeals, and suing for the wrong cause in contradiction to the law. As will be seen below, the Sibomana, Rurangirwa, and Harelimana’s cases were similarly inadmissible because of submitting claims that were contrary to the law, specifically in contradiction with Article 25 of the 08/96 organic law.\textsuperscript{473}

IV. Prosecutor versus Major Nyirahazimana and Pasteur Ngirinshuti

The prosecution accused the above defendants of various genocide acts, such as superior responsibility, given that Nyirahazimana had the rank of a major in the military where he engaged in genocide and encouraged others to kill Tutsi. As for Ngirinshuti, he was a pastor and acted as an accomplice in killing victims. Both defendants were accused of incitement to commit genocide, voluntary destruction of Tutsi houses, criminal group formation, violation of domicile and complicity in the killings.\textsuperscript{474} Just like Banzi

\begin{thebibliography}{99}
\bibitem{471} For details, Urukiko rw’Ikirenga, Icyegeranyo cy’Ibyemezo by’Urukiko rw’Ikirenga, Imanza z’Inshinjabyaha n’iza Jenocide (2007), Ubushinjacyaha na Gatorano Didace, Urupapuro rwa 1-4.
\bibitem{473} Art. 25 of the 08/96 Organic Law allowed examination for cassation, only if the defendants had been sentenced to death penalty on appeal yet at first instance they were declared innocent.
\end{thebibliography}
Wellars et al., in the specialized chamber, and based on Articles 2, 14, 89, 90, 91, 312, 166, and 444 of the Rwandan penal code, the court found the above defendants guilty. They were sentenced to death and ordered to pay reparations equivalent to 12,483,317 FRW (18,915 USD) to be paid jointly with the government of Rwanda. Not content with the decision of the court, the defendants appealed the verdict. However, due to subsequent changes in the law and after the Supreme Court found that there was yet no definitive decision on the matter, the Supreme Court referred the case to the competent Gacaca court of appeal. Gacaca courts of appeal were endowed with competence to resume appeal cases awaiting trial before the high court of the republic, the military high court and the Supreme Court.

Although this case shows certain instability and regular modifications of laws, it nevertheless, illustrates how national courts solved the problem of retroactive punishment as seen in the previous trial within the high


477 For details, see Urukiko rw’Ikirenga, Icyegeranyo cy’byemezo by’Urukiko rw’Ikirenga, Imanza za Jenocide (2008), Ubushinjacyaha na Major GD Anne Marie Nyirahakizimana na Ngririnshuti Athanase, Urupapuro rwa 20.

478 Arts. 89, 90, 91, 166, 444, 1, and 12 of the 1977 Rwandan Penal Code; Arts.1 and 14 of the Organic Law N° 08/1996 of 31 August 1996 on the Organization of Prosecutions for Offenses constituting the Crime of Genocide or Crimes against Humanity.


480 Prosecutor v. Gd Anne Marie Nyirahazimana and Ngririnshuti Athanase (RPA.003/GEN/06/CS) 27/06/2008), judgment of 27/06/2008.

481 This was in reference to Organic Law N° 13/2008 of 19/05/2008 modifying Organic Law N° 16/2004 of 14/06/2004 determining the competence of Gacaca courts in its Art. 26 which allowed national courts to transfer genocide cases to Gacaca courts of the place where the crimes were committed as long as no final judgment had been made.

482 P.C. Bornkamm, Rwanda’s Gacaca Courts: Between Retribution and Reparation, (2012), at 44; Art. 9(2) and (3) of Instructions N° 16/2008.
The 08/96 organic law organised prosecution and punishment of genocide suspects based on existing crimes under domestic criminal law. Different paragraphs in the judgement refer to articles within the penal code as the motivation for the accusations and basis for decisions rendered.

Therefore genocide suspects were tried for ordinary crimes in the penal code if they were carried out with intention to commit genocide or crimes against humanity. The special intent degree is what distinguishes for instance the ordinary crime of murder from the crime of genocide. In fact it is considered that the perpetrators’ intent is a central requirement to commit genocide. Another important element seen in this case, though not elaborate, is the notion of superior responsibility under domestic law and complicity where the accomplice may incur the same punishment as the perpetrator.

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V. Prosecutor versus Harelimana et al.

All the defendants were accused of various genocide acts as indicated in the table above. Harelimana, Rudodo, Mutabaruka, and Harindwintwali were sentenced to death whereas Bimenyimana was sentenced to life imprisonment. On appeal, in the Nyanza appellate court, the defendants having a lawyer from Avocats Sans Frontiers received the same sentence as in the prior court. Still not content with the decision of the court, the defendants applied for cassation of the case at the supreme level. Nevertheless, the Supreme Court found the case inadmissible.

As pointed out earlier, this case like many others examined in this study denotes how ignorance of the law by defendants and their lawyers would lead to inadmissibility of cases. Particularly, in the context of the issue at hand, the defendants could have perhaps applied for review other than appeal as suggested by the judges, for the reason that the appellants claimed that one of the panel members in the previous appellate court was no longer a judge.

In regard to penalties by the courts, this case shows how national courts often handed down maximum penalties for the convicts, unlike the ICTR where most convicts got prison terms. For instance, the higher court had sentenced Harelimana and three others to death and Bimenyimana to life imprisonment. In comparison to international trials conducted by the ICTR, it is found that the sentences imposed by national courts were more severe, i.e life imprisonment or the death penalty, though the latter was abolished

488 Harelimana Etienne, Rudodo Joseph, Mutabaruka Joseph, Harindwintwali Antoine and Bimenyimana Emmanuel.


490 However, it should be recalled that at one stage Avocats Sans Frontiers (ASF) provided foreign defense attorneys to represent genocide suspects in court, W.A. Schabas, ‘Genocide Trials and Gacaca Courts,’ 3 Journal of International Criminal Justice, (2005), at 886.

491 For details, Urukiko rw’Ikirenga, Icyegeranyo cy’Ibyemezo by’Urukiko rw’Ikiren-ga, Imanza za Jenocide (2008), Ubushinjacyaha na Harelimana, urupapuro rwa 31.

492 See Prosecutor v. Harelimana Etienne et al., judgment of 15/05/2003 (Nyanza appeal court), 20/06/2008 (Supreme Court).
in 2007. The suspects tried by national courts were not as prominent as the high profile perpetrators tried in Arusha, but when it came to sentences, they received either equal or higher sentences than their commanders or superiors who instigated and encouraged them to commit genocide. Most of the accused in national prosecutions were mere counsellors, military personnel and civil servants, but not the master minds or conspirators.

VI. Prosecutor versus Nzirabatinyi

When the case of Nzirabatinyi reached the jurisdiction of the Supreme Court, the judges prescribed the same sentence of life imprisonment as the other first two inferior courts. The defendant, who was a medical assistant, was accused of instigating and encouraging genocide, giving orders to kill, complicity, aiding and abetting. Witnesses testified that he used to reveal Tutsis in hiding places, attended roadblocks and would accompany killers by guarding the victims so that no one would escape the killing, thus aiding others to commit crimes. After hearing many prosecution witnesses and arguments by his lawyer, the Supreme Court judges found that, although the defendant did not himself hold a gun to shoot, he nevertheless greatly aided and abetted the criminal group which attacked some Tutsi families, through accompanying and assisting them in killing, and so must be punished like anyone who killed. In this way, the defendant is not necessarily required to kill with his own hands in order for him to be held criminally liable.

495 *Prosecutor v. Nzirabatinyi Felecien* (RPAA 0044/GEN/06/CS), judgment of 20/06/2006; Arts.1, 2, 14, 15, 16, 89, 90, 91 and 312 of the 1977 Rwandan Penal Code; Organic Law N° 08/1996 of 31 August 1996 on the Organization of Prosecutions for Offenses constituting the Crime of Genocide or Crimes Against Humanity.
Therefore the court maintained the prior court’s sentence of life imprisonment against Nzirabatinyi, which is comparable to Mvumbahe law in the former specialised chambers.\footnote{See, case in the Specialized Chamber, \textit{Prosecutor v. Mvumbahe Denys} (R.M.P 56.204/S4/NA/KBY, R.P. Ch.Sp.005/01/2000), judgment of 16/07/2000 (Urugereko rwihariye rwa Kibuye). The accused was as well sentenced to life imprisonment for genocide charges. See also Urukiko rw’Ikirenga, Icyegeranyo cy’Ibyemezo by’Urukiko Rw’Ikirenga, Imanza za Jenocide, (2008), Ubushinjacyaha na Harelimana Etienne, Urupapuro rwa 31.}

A lesson from this case is that any role played in committing genocide should be considered and criminalised. As a criminal law norm, criminal responsibility does not require an offender himself to have executed the killing but any form of participation incurs liability. In such a scenario, the case depicts the need to establish the individual criminal responsibility of each accused person. The focus on the individual rather than the group removes the possibility for collective blame.\footnote{A. Karekezi \textit{et al.}, ‘Localizing Justice: Gacaca Courts in Post-Genocide Rwanda,’ in E. Stover and M. Weinstein (eds.), \textit{My Neighbour, My Enemy: Justice and Community in the Aftermath of Mass Atrocity}, (2005), at 74 et seq.} This case further clarifies and brings to light various important notions, such as, incitement to genocide, complicity, aiding and abetting as well as superior responsibility.

This case also shows a close relationship of Gacaca courts with national genocide trials where the judges sought Gacaca files to get information on the defendant that was collected during the Gacaca information gathering phase.\footnote{Penal Reform International, Monitoring and Research Report on the Gacaca: Information-Gathering during the National Phase, (2006); Human Rights Watch, Law and Reality: Progress in Judicial Reform in Rwanda (July 2008).} In several cases there was much reference to Gacaca witnesses and alleged accomplices, as manifested in Pandasi’s trial.

A problem that is evident in a number of national court cases is that several witnesses used to give hearsay evidence and sometimes contradictory witness testimony. This affected the value of available evidence before the courts. This is also apparent in Gataza’s case, where there was hearsay testimony and contradictory statements in regard to dates, victims and perpetrators.
Nzisabira Jean Baptiste was charged with genocide crimes that occurred in various places in Rwanda. He participated in criminal groups and committed genocide against a great number of people because they belonged to the Tutsi ethnic group.

The prosecution’s accusations against the defendant were confirmed and the court sentenced him to life imprisonment and ordered that, reparations be paid jointly with the government of Rwanda. When the defendant appealed to the higher court he received the same punishment of life imprisonment with deprival of civil liberties. After the matter was taken to the Supreme Court, the claim was found to be in compliance with the legal requirements for appeal. Nevertheless, after examining the matter and hearing many witnesses, the judges confirmed the genocide charges against the defendant and overturned the sentence to 19 years’ imprisonment. Although there were more incriminating or prosecution witnesses than defense witnesses, the judges emphasized that it is not about the number of witnesses but the substance of evidence given.

Quite clearly, this case shows that there is a significant level of independence of the judges from the prosecution and vice versa. The prosecution does not influence the judges, as seen in several denials of their requests.
towards the accused like in the Pandasi case.\textsuperscript{504} Likewise, the prosecution can appeal against any decision of the judges as seen in Nyirahazimana case.\textsuperscript{505} Also, as evidenced in all the cases, the number of judges to adjudicate a matter is three. This helps in fostering impartiality of the court and makes the decision more democratic.\textsuperscript{506}

Thus, this case portrays the fairness of the national court system where it provides for a triple degree jurisdiction for parties to the case. The defendant, prosecution or civil parties have a right to appeal in the various competent courts following their hierarchy, of course depending on the subject matter at hand.\textsuperscript{507} As seen in this case, the same subject matter was examined in three various courts at different periods and at the end, the sentence of life imprisonment was overturned to 19 years’ imprisonment. It is important to note that the final decision of the last superior court always remains binding on all parties.

The trial also manifests the tedious and slow nature of the ordinary process of justice. The trial was postponed several times due to the fact that the defendant had to look for a lawyer. Later, the appointed lawyer also requested a postponement in order for him to read his client’s dossier and in another scheduled hearing, the trial did not take place due to the absence of one of the judges adjudicating the matter because of other official functions. Postponement of hearings has been a common feature of the ordinary court process. This is disadvantageous particularly for victims who want to see justice done.

\textsuperscript{504} Prosecutor v. Pandasi et al. (RS/Rev 0007/06/CS), judgment of 17/04/2006. See also judges’ denial of the prosecution’s requests in the specialised chambers; see, Prosecutor v. Kalisa Ignace et al., (R.P 65/S1/CH.SP/RSHI), judgment of 14/11/1997, Prosecutor v. Muzatsinda Emmanuel, (R.M.P 900/S11/NG/KE/ R.P. 041/CS/KIG), judgment of 17/03/1998. All these defendants were found not guilty of genocide contrary to the prosecution’s requests.

\textsuperscript{505} Prosecutor v. Gd Anne Marie Nyirahazimana and Ngirinshuti Athanase (RPA.003/ GEN/06/CS) 27/06/2008), judgment of 27/06/2008.

\textsuperscript{506} For characteristics of impartiality see, P.C. Bornkamm, Rwanda’s Gacaca Courts: Between Retribution and Reparation, (2012), at 104 et seq; Art. 1 of Organic Law N\textdegree 20/2006 of 22/04/2006 provides that criminal judgements must be held in public audience, be fair, impartial, comply with the principle of self defence, cross examination, treat litigants equal in the eyes of the law, base on evidences legally produced and be rendered without any undue delay.

\textsuperscript{507} Art. 24 Organic Law N\textdegree 08/1996 of 31 August 1996 on the Organization of Prosecutions for Offenses constituting the Crime of Genocide or Crimes Against Humanity.
Chapter Four: Prosecution of Genocide in National Courts

VIII. Prosecutor versus Pandasi, Bugeri and Nzajyibwami

Like other national court cases, the judgment began by mentioning full identification of the defendants, the property of the defendants, seized court as well as the accusations. In the Ruhengeri court, the defendants were accused of genocide, where the first two accused persons were sentenced to death and Nzajyibwami was sentenced to life imprisonment. They appealed to the appellate court of Ruhengeri which upheld the previous sentence. Then they applied for review of the case but the case was dismissed. The defendants claimed to be declared innocent because their alleged accomplices in Gacaca had not mentioned them in their confessions.

However, on the 17/04/2006, the Supreme Court ruled that the motivation of the request for review was baseless, because it was just writing errors in the judgment where the former court mistakenly included the civil plaintiff among the people killed by defendants. In regard to the claim that Gacaca defendants did not mention them as accomplices, the court advanced that this was not enough evidence or probable truth to make them innocent. The defendants hence lost the case and were therefore bound by the prior court’s decision where Pandasi and Bugeri were sentenced to death and Nzajyibwami was to serve life imprisonment.

Apparently, this case shows the retributive nature of classical justice within the national court system. A lesson from several national court cases as the one at hand is that such cases can hardly contribute to reconciliation.

because of the adversarial way in which they are conducted. In fact, the defendants are always seeking to be declared innocent rather than revealing their role in the genocide, while the victims are longing for punishment of the perpetrators for the losses suffered. There is little confession of defendants because they want to avoid punishment and win the case other than telling the truth. This is different from Gacaca, where the process is more oriented to truth telling, confession and reduced sentences with aim of reconciliation. It is thus submitted that the kind of justice achieved through national courts has fostered limited reconciliation for Rwandans.

As already seen in a few other cases, the defendants in this trial suffered from lack of legal representation, yet the state was always represented by the prosecution. This contradicts the principle of equality of arms where the prosecution and defendant must be on equal footing. Though Rwandan law clearly allows for defence counsel in criminal matters but not at the expense of the government, most suspects were too poor to afford lawyers. For instance Pandasi and Nzajyibwami were mere subsistence farmers, and Bugeri was a guard in the National Park. In other instances, some lawyers were personally unwilling to represent genocide defendants in courts of law.

IX. Prosecutor versus Rurangirwa, Bimenyimana, and Ntawangaheza

These defendants were accused of various acts of genocide, like criminal group formation, destruction of Tutsi houses, rape, torture, unlawful gun possession, and non-assistance of persons in danger among other crimes. On the 23/03/1998, the above defendants were sentenced to death


516 See Arts. 256, Decree-Law N° 21/77 of 18 August 1977 instituting the Penal Code as completed, Official Gazette of the Republic of Rwanda, Special N° 13 bis of 1 July 1978. The Penal Code imposes an obligation on every Rwandan citizen to provide assistance to persons in danger.
and deprival of civil liberties as was done by the specialized chamber in Karorero Charles et al. Then they lodged an appeal in the appellate court of Nyanza which removed some charges like unlawful gun possession and non-assistance of persons in danger, but still pronounced the same death sentence as the inferior court. Subsequent to the modification of laws and competence of the Supreme Court, the defendants’ second appeal was inadmissible.

Like many other cases discussed, this particular case shows how retributive justice is characterized by prolonged cases, for instance, it started on the 23 March 1998 from the first trial in the Butare court in the south, and the final decision was pronounced by the Supreme Court on the 20 June 2008, which is really a lengthy period before justice can be fully obtained. Therefore retributive justice in the national courts seems to be a slow and tedious process, perhaps due to the fact that, it is the same courts which have to deal with ordinary crimes too.

In this specific case, the accused persons were tried for rape, among other crimes because it was a Category One crime, but after 2008 those accused of the crime remained in Category One but were transferred to the jurisdiction of Gacaca. So rape cases before the 2008 amendment fell within the jurisdiction of national courts. This shows constant alteration of genocide laws and suspects in various jurisdictions, sometimes affecting the credibility of the courts.

As noted earlier, this case shows that absence of civil claims meant no reparation to victims by offenders. Although the defendants mentioned above destroyed Tutsi houses, there were no civil parties to the case, and hence no judgment on reparations.


519 See *Prosecutor v. Rurangirwa Hyacinthe, Bimenyimana, and Ntawangaheza* (RPAA 003/GEN/06/CS), judgment of 23/03/1998, (First trial), judgment of 25/07/2001 (First appeal), judgment of 20/6/2008 (Second Appeal). The appeal violated Art. 25 of the 08/96 Organic Law which required the defendants to have been sentenced to death penalty on appeal yet innocent at first trial.

X. Prosecutor versus Sibomana

The prosecution accused the defendant of genocide and other crimes against humanity as indicated in the table above. Upon examination of both incriminating and exonerating evidence by the judges, the Kigali specialised chamber, declared the defendant guilty of the charges and sentenced him to death and deprival of all civil liberties. The defendant was also to pay 4,257,900 RWF (6,451 USD) as reparation to the civil plaintiff or victims because of his criminal acts, which were perpetrated with the intention to destroy Tutsis in whole or in part as defined by the Genocide Convention, ICTR Statute and the 08/96 organic law.

The defendant appealed to the court in Kigali, which then confirmed the charges and imposed the same sentence as the former specialised chamber. When the matter was taken to the Supreme Court on the 13 June 2008, it was found inadmissible because the matter could not be examined in more than two instances as provided by the 08/96 organic law. So the parties were still bound by the judgment of the previous court.

In viewing genocide sentences, this particular case, like many others in the national courts, shows that there is possibility of a secondary punishment added to the principal one, as ruled by the appeals court in Kigali. In addition to the main sentence, a genocide convict may incur loss of civic rights.

However, a brief look at the ICTR jurisprudence shows that it does not im-


523 Art. 25 of the 08/96 Organic Law provided an exception of persons that were found innocent at first instance then received death penalty at appeal level would then have a right to examine their matter in the Supreme Court.

524 Art. 66 of the Rwandan penal code includes the loss of civic rights as an accessory penalty to the main sentence, see Decree-Law N° 21/77 of 18 August 1977 instituting the Penal Code as completed, Official Gazette of the Republic of Rwanda, Special N° 13 bis of 1 July 1978. Similarly, those convicted under the Gacaca Law may incur accessory punishment where they are deprived of their rights to be elected to public office and to serve in certain official functions. However in the course of the 2007 amendment of the Gacaca Law, this sanction was mitigated. Instead the new Article 76(5) stipulates a more extensive and detailed publication of the identity of those convicted and their crimes.
pose supplementary sentences. This also applies in the case of defendants transferred by the ICTR or extradited by third states to Rwanda, which eventually shows some inequality in the treatment of genocide convicts.

Also, from this judgment, it is evident that the judges have always to motivate the court decisions and sentences through reference to various laws dealing with the crime of genocide. In other words, the case illustrates how the judges have to always give a legal motivation for each finding, right from admissibility or inadmissibility of the case to the final judgment, relying on both national and international law. Hence every accusation goes along with a legal provision to avoid violation of the principle of legality, which provides that there can be no crime without law, and no punishment without law (*nullum crimen nulla peona sine lege*). The same requirement applies to the prosecution which is always required to provide the legal basis of each accusation.

In concluding this analysis of the domestic case law, the researcher submits that the novelty of the Organic Law of 30 August 1996 lies in establishing the dual incrimination principle. This is where the judges had to first check whether a specific offence in the Penal Code was committed by the defendant and also verify whether the offence amounted all together to a crime of genocide or a crime against humanity. The approach allowed a court

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525 Life imprisonment is the maximum sentence given to ICTR convicts according to the ICTR Statute, see *The Prosecutor v. Jean Kambanda*, Case No. ICTR-97-23-S, Judgment and Sentence (TC), 4 September 1998.


to rely at the same time on the domestic law and on the Genocide Convention, the four Geneva Conventions of 1949 and their Additional Protocols and on the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity of 26 November 1968.

In practice, the judges who were not professional lawyers in terms of international law struggled to apply the principle of dual incrimination, particularly by failing to refer to both national and international norms and hence could be challenged at times for violation of the principle of legality.

As already discussed in the above case law, some of the judges did not in effect base on international legislation. For example, in the jurisprudence of Prosecutor v. Hanyurwimfura Epaphrodite, the judge simply relied on the organic law of 30 August 1996 in rendering the decision and did not refer at all to international law. In the case of Prosecutor v. Karorero Charles et al., the judge’s ruling made no reference to international law but instead based on domestic law, which is also seen in the case of Prosecutor v. Nyirahazimana and Ngirinshuti. Relying exclusively on domestic law indicates that judges were not familiar with the international law norms.

However, there are judges who efficiently relied on both international law and domestic criminal law in rendering judgments. For instance, in the case of Prosecutor v. Sibomana as well as in the case of Prosecutor v. Mvumbahe Denys et al., the Court relied on the Genocide Convention of 1948 and on relevant domestic provisions, such as the Constitution. In the case of Prosecutor v. Banzi Wellars et al., the Court argued that each of the defendants had violated international law. In the judgment, the judges carefully based their ruling on both international law and on the 08/96 Organic Law. Other judges relied on both international law and the Rwandan Penal Code. Examples include the case of Prosecutor v. Sibomana and Prosecutor

v. Ukezimpfura Jean et al., where the courts based on international law, like the Statute of the ICTR, and domestic law provisions. 532

Finally, despite reference to various national and international legal provisions within the judgments, there is little reference to international case law, particularly ICTR case law. 533 In clear instances, the national court cases have not drawn much inspiration from existing international jurisprudence, which could have facilitated harmonisation of case law on related matters. Even so, cases from national courts present various lessons that can be drawn from their achievements and shortcomings as presented below.

E. Achievements of National Court Trials

Since the 1994 genocide which devastated the national judicial system, Rwanda has worked hard to rebuild its judiciary. 534 In the aftermath of the genocide, the Rwandan government has developed the courts’ human and material resources, as well as court structures. 535 More importantly, the ordinary courts have tried a significant number of genocide suspects, punished convicts, acquitted those not guilty and reintegrated vast numbers of genocide perpetrators within the society, thereby ensuring justice for both victims and perpetrators. 536 So far, over 15,000 genocide suspects have been tried

533 W.A. Schabas, ‘Genocide Trials and Gacaca Courts,’ 3 Journal of International Criminal Justice, (2005), at 889. He views the Tribunal’s jurisprudence to have had such a limited impact on the national court trials which could be explained by the fact that most genocide-related judgments in Rwanda do not generally deal with legal issues, but rather focus mostly on factual issues which nevertheless provides an insight into the dynamics of the genocide.
534 A. Des Forges, Leave None to Tell the Story: Genocide in Rwanda, (1999), at 748.
by the ordinary courts from the time when the genocide law was adopted in 1996.

The genocide trials held since 1996 have produced an important body of case law on core crimes which provides information on the dynamics of genocide. These judgments will be of significance to researchers and criminal lawyers who deal with an assessment of factual issues. They are therefore of great practical use to Rwandan judges and lawyers engaged in the ongoing prosecutions, and the cases establish principles for interpretation of the national legislation dealing with genocide prosecutions.

Moreover, though not as lengthy as the ICTR judgments, the case law reports of national courts will be without doubt of interest to historians because some of the more lengthy judgments provide informative and detailed accounts of specific episodes during the months of April, May and June 1994. Some judgments have gone to over fifty pages, providing useful facts and information on the crime of genocide, as seen in the case of Banzi Wellars. However, all the judgments and documents in the archives are


in the national language, Kinyarwanda. This constitutes a barrier for researchers from outside Rwanda.

Importantly, as far as national trials are concerned, domestic case law forms part of state practice and could thus influence future prosecutions.\textsuperscript{542} On a broader note, national legislation and genocide case law may give effect to the obligations enclosed in the 1948 Genocide Convention.\textsuperscript{543} Therefore, the Rwandan domestic practice has not only clarified a number of issues of the crime of genocide, but it has further shaped domestic application of the Genocide Convention. What seems most reasonable is the fact that national application of the Convention leads to a better understanding of the Convention itself, more specifically, what genocide means and how to deal with the crime domestically.\textsuperscript{544} Based on the experience of Rwanda, it can be asserted that by incorporating the crime of genocide into the domestic legal system and applying it, the scope of the crime will be fixed.\textsuperscript{545} The courts have therefore promoted the domestic application of international criminal justice and legislation.

Another crucial lesson to be learnt from this process is that mounting large scale prosecutions in the post-conflict environment ensures accountability, deterrence and justice at the national level, thus meeting the justice demands of victims and suspects.\textsuperscript{546} The Rwandan experiment thus is contributing a new element, namely that there is no tolerance or compromise in dealing

\begin{footnotesize}
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\item J. Wouters and S. Verhoeven, ‘The Domestic Prosecution of Genocide,’ \textit{Leuven Centre for Global Governance Studies and Institute for International Law}, (2010), N° 55, at 1 et seq.
\item Art. IV of the Genocide Convention provides an express obligation to prosecute with regard to genocide.
\item M. Inazumi, \textit{Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes under International Law}, (2005), at 22 et seq.
\end{enumerate}
\end{footnotesize}
with impunity that characterised the past decades.\textsuperscript{547} This is because domestic systems principally stand as primary forums for prosecution of international crimes rather than international mechanisms. Authors like Cassese argue that these international mechanisms are just back-up institutions which will be unable to prosecute all perpetrators.\textsuperscript{548} Even after the creation of the ICC, direct enforcement of international criminal law is primarily for domestic jurisdictions and the ICC will intervene only in case of inability or unwillingness of states to prosecute.\textsuperscript{549} States with their own police forces, structured court system, adequate legislation offer better places for this task, at least if they are willing to use their potential in combating international crimes.\textsuperscript{550}

This factor, combined with greater access to evidence, witnesses, victims and perpetrators, makes national courts indispensable in developing international criminal justice. It is therefore submitted that even where a prosecution is brought to an international tribunal, national courts will retain a fundamental role in the process of arresting defendants, taking testimony under oath, authorizing searches and seizures, and freezing the proceeds of crimes, in cooperation with international courts.\textsuperscript{551}

Furthermore, as already said, trials held in the affected country may have greater relevance to victims and the society than distant trials conducted far abroad.\textsuperscript{552} Therefore Rwanda’s experience in dealing with the legacy of the


genocide and other human rights abuses offers lessons to other societies that may have to deal with the aftermath of atrocity.

In sum, one cannot neglect the function of national courts in determining international criminal law. This is due to the fact that their practices may confirm or create customary law and contribute to the formation of general principles of law. Their judgments can also serve as aids in recognising international criminal law, helping to determine the content of the norms of international criminal law.  

F. Major Shortcomings of Domestic Prosecutions

Generally, national trials also feature many legal inconsistencies in the application of international law and practical pitfalls in dealing with the core crimes. The case of Rwanda presents its own weaknesses, perhaps due to the horrific nature of the violence, large-scale participation in the genocide, complexity of the crime itself, inability of the courts and unprecedented experience in the region. Therefore state prosecution of the crime was prone to face different shortcomings as discussed below.

I. Congested Prisons and Insufficient Infrastructure

Given the fact that prior to April 1994, the national judicial system had many serious flaws, one wonders about the standard of the judicial system after the massacres. Without delving into detail, it is much easier to figure out


that, in a country where the massacres ceased without a peace agreement but with the use of force, and where the war had annihilated the judiciary's human and material resources, state structures, including courts had also been destroyed.\textsuperscript{556}

When the current government took over power in July 1994, the judicial system was totally shattered through the killing of judges and administrative staff, the flight of others usually due to their involvement in acts of genocide, the destruction of working materials and equipment, loss of archives, collapse of the state machinery and judicial police.\textsuperscript{557} The urgent task in the area of justice was to train judges, prosecutors and support staff.\textsuperscript{558}

For instance, before the genocide started on 7 April 1994, there were 758 judges but only 44 among them had a law degree. The prosecution had 70 prosecutors in total, but only 22 had a law degree. Following the genocide, of the 758 judges, only 244 remained, and of the 70 prosecutors, only 12 were in the country. With support from various donors and countries, the country had to train judicial staff. After the training, judges increased to 841, whereas the prosecutors numbered 210 and the support staff numbered 910.\textsuperscript{559}

What was more challenging is that the 120,000 suspects in prison after the genocide implied thousands of prosecutions which would then require a judge, prosecutor, legal defence, and court infrastructure.\textsuperscript{560} Quite obvious-

\begin{itemize}
\item \textsuperscript{556} J. Fierens, ‘Gacaca Courts: Between Fantasy and Reality,’ 3 Journal of International Criminal Justice (2005), at 898.
\item \textsuperscript{558} National Service of Gacaca Courts, Summary of the Report presented at the Closing of Gacaca Court Activities, Kigali, June 2012, at 5.
\item \textsuperscript{559} National Service of Gacaca Courts, Summary of the Report presented at the Closing of Gacaca Court Activities, Kigali, June 2012, at 6.
\end{itemize}
ly, the ordinary courts could not deal with the backlog of cases and keeping
the vast majority of the suspects in prison without a trial proved to be simply
difficult due to various reasons such as prison overcrowding, the demands
for justice by the victims and suspects.561

Five years after commencement of the genocide trials, an assessment of
their progress showed that only 6,000 cases had been tried.562 Therefore,
trying all the genocide detaineees would have taken more than 100 years
according to different estimates, and probably no trials would have taken
place because suspects and eye witnesses would no longer be living.563 At
this pace, national courts would not be able to deal with all the genocide
suspects in the overcrowded prisons hence the need for an alternative mech-
anism such as Gacaca.564

561 See the recommendations by ASF, April 2008, available at <www.asf.be/in-
dex.php?module=publicaties&lang=fr&id=53>, visited August 2011. Also, Inter-
national standards relating to prison conditions are laid down in Art. 10 of the,
International Covenant on Civil and Political Rights (ICCPR). More detailed pro-
visions are included in Art. 28 of Law N° 38/2006 of 25 September 2006 Estab-
lishing and Determining the Organisation of the National Prison Service, O.G.R.R.
N° Special of 23 October 2006.

562 Urwego rw’Igihugu rushinzwe Inkiko-Gacaca (RCN-Justice and Démocratie), Iso-
mo ku Itgeko Ngenga N° 16/2004 ryo kuwa 19/06/2004 rigena imiterere, ububasha

563 P.C. Bornkamm, Rwanda’s Gacaca Courts: Between Retribution and Repara-
tion, (2012), at 22-23 et seq; J. Fierens, ‘Gacaca Courts: Between Fantasy and
Reality,’ 3 Journal of International Criminal Justice, (2005), at 899. The number
of genocide suspects to be tried did not include only those in prison, many genocide
suspects were still at large; Ministeri y’ubutabera (June 1999), Inkiko-Gacaca mu
manza z’itesematsemba ryabaye mu Rwanda kuva tariki ya 1 ukwakira 1990 kugeza
tariki ya 31 ukubozu 1994, at 5; Recommendations of the Conference Held in Kigali
from 1st November to 5th November 1995, at 23; Gacaca, Incamake Ya Rapor
Yatanzwe Ku Izozwra ry’imirimo y’Inkiko Gacaca, Kigali, June 2012 at 5.

564 See Avocats Sans Frontieres (ASF), Ingendanyi, Imiburanishirize y’Icyaha cyi
Jenocide n’Ibyaha hyiibasiye Inyokumuntu Mu Inkiko zisanzwe z’u Rwanda 2004,
(2005), at 7 et seq, Similarly see, W.A. Schabas, ‘Genocide Trials and Gacaca
Courts,’ 3 Journal of International Criminal Justice, (2005), at 895; Avocats Sans
Frontieres (ASF), Ingendanyi, Imiburanishirize y’Icyaha cyi Jenocide n’Ibyaha
hyiibasiye Inyokumuntu Mu Inkiko zisanzwe z’u Rwanda 2004, (2005), at 7 et seq;
Human Rights Watch, ‘Rwanda: the Search for Security and Human Rights Abus-
II. Violation of Fair Trial Rights

Another principal shortcoming of national court trials is inadequate guarantees of due process and fair trial rights, largely due to poor economic capacity and inefficiency\textsuperscript{565} that characterizes developing countries. The courts have sometimes failed to meet not only international standards but also national law on fair trial guarantees.

1. The Right to Speedy Trial

This is perhaps not easy to address because there are no fixed days, weeks or years to establish the duration of a trial or determine a delayed proceeding.\textsuperscript{566} So the time is determined depending on each particular case, based on the complexity of the matter, conduct of the defendant and performance of the judicial personnel.

For example, to date, it has taken more than eighteen years to try genocide suspects in Rwanda. Prior efforts to address some of these defects through programs including pre-trial detention hearings and the vast release of extremely old, young, or ill detainees have been applied but without notable success of speeding up trials for the remaining detainees.\textsuperscript{567} In fact, before the transfer of suspects to Gacaca, a number of them had been detained for

\textsuperscript{566} See Avocats Sans Frontieres (ASF), Ingendanyi, Imiburanishirize y’Icyaha cya Jenocide n’Ibyaha byibasiye Inyokumuntu Mu Inkiko zisanzwe z’u Rwanda 2004, (2005), at 48.
\textsuperscript{567} Presidential Communiqué of 1 January 2003, at 20. The beneficiaries of the provisional release were detainees who had already confessed and risked spending more time in prison than their presumed sentence, those who had been minors at the time of their crimes, and those who were old or seriously ill. Despite protests from victim organizations, 25,000 detainees were provisionally set free in January 2003 after the Communiqué was issued. In 2004, 2005 and 2007 new masses of releases followed, see Hirondelle News Agency, Rwanda Liberates over 9,192 Prisoners, 19 February 2007, at <http://www.hirondellenews.org>, visited June 2012; see also Integrated Regional Information Network (IRIN), 4,500 Prisoners Released, 23 March 2004.
years without being tried, while others had already served more time than the maximum prison sentence they would receive if they had been convicted earlier, and others were found innocent after long periods of detention. However, it is sufficient to note that this is comprehensible, given the caseload, economic constraints and the fact that conventional justice is limited capacity wise.

2. The Principle of Presumption of Innocence

In regard to the genocide cases within the competence of ordinary courts, the principle relating to the presumption of innocence is adequately provided for under the law; in other words ‘a suspect is innocent until proven guilty.’ However, after the genocide, pre-trial detention had become a principle rather than an exception. This was because of the inability of the national system to either carry out extensive investigations or render hearings to all suspects.

After subsequent complaints, the situation was rectified during trials, and when the prosecution did not give sufficient evidence on the criminal suspect, it became a reason for acquitting the suspect as indicated in the case of Kabirigi Anastase et al, where the specialized chamber of Kibuye court of first instance found the co-accused Muhayimana Cyprien not guilty of the alleged crimes because of lack of sufficient evidence from the prosecution as cited below.

‘Rusanze Muhayimana Cyprien ibyaha aregwa bya Jenocide, Ubuho-tozi, Gusahura no Kurema Umutwe w’Abagizi banabi byose bijyana n’igitero yagiyemo kwa Dansira Kamberuka ntabiménye tos ubushinjacyaha bwagaramagarije Urukiko.’

The specialized chamber of Kibuye court of first instance found Muhayimana Cyprien not guilty of the alleged crimes because the prosecution could not prove beyond reasonable doubt that the defendant committed the alleged

accusations. However, such investigations and proceedings to establish a fair verdict have sometimes led to protracted hearings in violation of the right to speedy justice.\textsuperscript{569}

3. The Right to Counsel of One's Choice

The right of defendants to call upon a lawyer of their choice in order to protect their interests and defend them against charges is guaranteed under various instruments such as the ICCPR and African Charter.\textsuperscript{570} This right is a central feature of the principle of equality of arms, which ensures that the defence will have a reasonable opportunity to prepare its case on an equal footing with the prosecution.\textsuperscript{571} Also, as in most matters of criminal law, Rwandan law does provide for the participation of counsel at any stage of the proceedings in ordinary courts.\textsuperscript{572}

However, although there were enough laws on the right to legal representation, it was never easy to put it into practice for genocide suspects. The law acknowledges the right to counsel of one’s choice but specifies that he/she cannot be paid by the government.\textsuperscript{573} The right affected here is not so much the right to counsel, but a defendant's right to have access to a lawyer of his choice even when he is indigent, without any cost. This is contrary to

\textsuperscript{569} See International Crisis Group, ‘Rwanda at the end of the Transition’ (ICG, Africa Report N° 53, 13 November 2002), at 2; Avocats Sans Frontieres (ASF), Ingendanyi, Imiburanishirize y'Icyaha cy Jenocide n'Ibyaha byibasiye Inyokumuntu Mu Inkiko zisanzwe z'u Rwanda 2004, (2005), at 27-32. It is important to note that presumption of innocence applies irrespective of a confession, guilty plea and expression of remorse.

\textsuperscript{570} Art. 14(3) (b) and (d), The International Covenant on Civil and Political Rights (ICCPR); Art. 7(1) (c), The African (Banjul) Charter on Human and Peoples’ Rights (African Charter); Parquet General du Rwanda (PGR) and ASF, Compilation of International Instruments relating to Human Rights and the Administration of Justice, at 13-86; see D. De Beer, Ikurikiranwa mu Nkiko Ry’ibyaha by’itsembabwoko n’itsembatsemba: Amategeko Rishingiyeho, Editions RCN, (1995), at 4-12.

\textsuperscript{571} L. Werchick, ‘Prospects for Justice in Rwanda's Citizen Tribunals,’ 8 Human Rights Brief, (2001), at 15 et seq.

\textsuperscript{572} See Art. 75(1), Rwandan Code of Criminal Procedure (CCP) which guarantees the accused, the right to counsel.

\textsuperscript{573} Art. 36 of the Organic Law N° 08/1996 of 30 August 1996 on the Organization of Prosecutions for Offenses Constituting the Crime of Genocide or Crimes against Humanity.
the ICTR system which provides lawyers even to its so-called indigent defendants. Even though both systems are not without problems and neither are they expected to handle suspects in the same manner; there is however, a disparity between the courts’ treatment of defendants, which necessitates addressing the hinderance in an all-inclusive way.\(^{574}\)

Owing to the weak judicial infrastructure and little means of the government, suspects have been subjected to feeble legal representation in the aftermath of the genocide.\(^{575}\) This is visible from the decided cases, where certain courts would deny defendants their right to legal representation. In the early years of genocide trials, judges would not allow adjoining cases to another day, as requested by defendants still seeking lawyers, asserting that it was reason for delaying cases.\(^{576}\) It was after several criticisms and continuous training of the judiciary that the situation was improved. Various appellate courts reversed decisions that violated the defendant’s right to have legal counsel.

A case in point is the judgment of Ndukubwimana Leonidas who had been sentenced to capital punishment, and on appeal, the Kigali appeals court ruled that, the sentence given to the defendant without observance of his right to have a lawyer was contrary to the 1991 Rwandan Constitution,\(^{577}\) and Article 36 of the 1996 organic law. Later the appeals court found the defendant not guilty and he was acquitted.\(^{578}\) Literally translated from the court ruling in Kinyarwanda, the court put as follows the acquittal:


\(^{576}\) See Avocats Sans Frontieres (ASF), Ingendanyi, Imiburanishirize y’Icyaha cy Jenocide n’Ibyaha byibasiye Inyokumuntu Mu Inkiko zisanzwe z’u Rwanda 2004, (2005), at 39-41.

\(^{577}\) Art. 14 of the Constitution of 10 June 1991; see also the 2003 Rwandan Constitution as modified by Art. 27 of 13 August 2008 Amendment.

\(^{578}\) Urukiko rw’Ubujurire rwa Kigali 30/05/1997, Urubanza rwa Ndikubwimana Leonidas, Igitabo cy’imanza zaciwe n’inkiko z’u Rwanda zerekeranye n’icyaha cy’itsembabwoko n’itsembatsemba cyatangajwe na ASF n’urukiko rw’Ikirenga rw’Urwanda, Umutomba II, urupapuro rwa 257, urubanza N° 15, at 7.
Also the Cyangugu appeals court found that the previous court had violated Munyangabe Theodore’s right to have counsel of his own choice when the court denied his request to postpone or adjourn the trial so that he finds a lawyer. Upon examination of the case, Munyangabe was declared not guilty. Literally translated from the court ruling in Kinyarwanda;


In fact, it appears that the quality of the trials kept improving over the years as aptly observed by Michel Moussalli, the special representative for the U.N Commission on Human Rights, that most defendants had advocates in 1999. And in 2000, he found that the trials conformed to international standards. This is the reason why the Rwandan legislator in 2001 decided to entrust high category suspects to ordinary courts which, are supposed to respect due process rights of fair trial with regard to individuals who coordinated the genocide while transferring lower level offenders to a local mechanism.

579 Ndikubwimana Leonidas, v. the Prosecutor, the Kigali Appeals Court (RPA N° 04/97/R1/KIGALI, 30/05/1997); P. Clark and Z. D. Kaufman (eds.), After Genocide: Transitional Justice, Post-Conflict Reconstruction and Reconciliation in Rwanda and Beyond, (2008), at 125 et seq.

580 Munyangabe Theodore v. the prosecutor, Urukiko rw’Ubujurire rwa Cyangugu mu rubanza rwa Munyangabe Theodore, (RPA 003/R1/97 06/07/1999).


Although certain fair trial standards have been recognized as forming part of international customary law; 584 it has been a challenge for societies emerging from conflict to observe the duty to prosecute former human rights violators in conformity with international fair trial standards, and due process guarantees. 585 Owing to such criticisms over fair trial standards in Rwanda, several countries have refused to extradite genocide suspects, and in certain instances, opted for prosecution of the suspects. 586

G. Excursus: Prosecution of Genocide Suspects by Third States

I. Extradition Matters

As it is apparent from practice, several countries have refused the extradition of Rwandan genocide suspects due to concerns over fair trial and the independence of the judiciary in Rwanda. A case in point is the United Kingdom (UK) high court which so far is not alone in turning down extradition requests to Rwanda. As the UK high court judgment itself asserted, French and German courts have declined extradition requests. 587

On 23 October 2008 the Toulouse court of appeal refused to order extradition to Rwanda in Bivugabago, due to concerns over the administration of fair proceedings and safeguards for defence witnesses. A similar decision of refusing extradition was rendered in Mbarushimana on 3 November 2008

584 Art. 2(2) of the the International Covenant on Civil and Political Rights (ICCPR), provides for the obligation of fair trial implementation.  
by Frankfurt-am-Main court of appeal. Then, was the case of Senyamuhara in the appellate court of Mamoudzou on 14 November 2008 and Kamali in the Paris court of appeal on 10 December 2008 where extradition was denied. Additionally, on 9 January 2009 in the Kamana case, the Lyon appeals court turned down the extradition request of the defendant on same grounds.

A contrary decision was arrived at in the Swedish Supreme Court in the 2009 case of Sylvere Ahorugeze, where the court cited weaknesses in the Rwandan justice system but decided to extradite the suspect to Rwanda. Sweden did not find that extradition was in violation with Article 6 of the European Convention for the Protection of Human Rights (ECHR) or domestic Swedish law. However, following Ahorugeze’s application, the European Court of Human Rights (ECtHR) interceded in the case to solve the issue of extradition. The ECtHR demanded that the extradition be stayed until the application can be resolved. And in 2011, the Supreme Court in Sweden ruled that Ahorugeze should be released due to the time spent in detention, a decision that was not well received by the government of Rwanda. However, an added layer of complexity is that Ahorugeze is at the time of writing, living in Denmark. This means that the Rwandan authorities will have to turn to the Danish and not the Swedish judicial system if they want Ahorugeze extradited.

A challenging case on extradition concerns the UK high court of justice which on the 8 April 2009 settled an appeal of four Rwandan genocide suspects. They appealed against the decision of an extradition judge to send their cases to the UK secretary of state and, in turn, to Rwanda for prosecu-

588 Ahorugeze who was the Director General of the Civil Aviation Authority, during the Genocide is allegedly accused of committing Genocide and crimes against humanity in Gikondo Nyenyeri, Kigali City.


592 With exception of Dr Vincent Bajinya (Brown), the other suspects, Charles Munyaneza, Emmanuel Nteziryayo and Celestin Ugirashebuja were all Bourgmasters (Mayors).
tion in the high court of Rwanda, asserting that they would not receive a fair trial in Rwanda. As a result, the high court expressed concerns regarding difficulties the suspects might experience in securing witness testimony in proceedings held in Rwanda and concluded that the four suspects would suffer a real risk of violating their fair trial rights if they were to face prosecution in their home country. The high court did not contest the evidence that incriminated the suspects for genocide acts in 1994 but instead put emphasis only on the issue of fair trial. Schabas argues that the refusal to extradite should be raised in the clearest of cases and not, for example to deny underdeveloped countries the right to try genocide suspects simply because of problems of resources meaning that their courts lack the accessories of those in developed countries.

What is problematic however is that at the time of writing the suspects are free in the UK, which cannot prosecute them domestically because of

593 Brown, Munyaneza, Nteziryayo, and Ugirashebuja v. The Government of Rwanda, at § 1-33.


concerns over the principle of non-retroactivity where its legislation does not provide jurisdiction that goes back to the time of the Rwandan genocide. This is because the UK International Criminal Court Act allows domestic prosecutions for acts of genocide, war crimes or crimes against humanity committed in a foreign country only after the time of its enactment in 2001; in other words, the legislation does not cover crimes committed in 1994. 597 Consequently, this may yield impunity for genocide criminals where certain states refuse to extradite and neither carry out prosecutions themselves, which would be a violation of the aut dedere aut judicare principle. 598

Indeed, in assessing the above issues, the effects of impunity that arise when courts refuse to extradite suspects could be avoided where domestic laws in the refusing jurisdictions do permit prosecution. 599 Then, the pursuit of international human rights regarding fair trials would not mean impunity for genocide suspects. 600 Alternatively, states such as the UK could extradite to other countries with competence to prosecute such international crimes.


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A case in point is Germany, one of the forerunners in the world concerning national prosecution of international crimes by its adoption of universal jurisdiction laws.  

II. Third State Prosecutions: Case of Rwabukombe in Germany

Germany denied the extradition request of Rwabukombe to Rwanda because there were doubts as to whether he would receive a fair trial and decided to carry out the trial in its domestic courts. The refusal to extradite Rwabukombe, a former mayor of the Muvumba commune followed the ICTR precedent where the Tribunal had refused to transfer cases to Rwanda, raising doubts on the independence of the Rwandan judiciary from political influence, the possibility of life imprisonment with solitary confinement, and concerns over the protection of defence witnesses in Rwanda.

Following his arrest on 26 July 2010, Rwabukombe was placed in pre-trial custody. On 29 July 2010 he was charged under the German penal code with genocide, murder and abetting murder before the higher regional court of Frankfurt am Main. On 8 December 2010, the court confirmed the charges against Rwabukombe. His trial was opened on 18 January 2011, and at the time of writing, is still underway. It is submitted that this

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601 See § 1 Völkerstrafgesetzbuch (2002) and before this code, § 6 No. 1 StGB was applicable. § 7 II No. 2 StGB, provides that where there is non-extradition, German courts may prosecute; C. Ryngaert, Jurisdiction in International Law, United States and European Perspectives, (2007), at 564 et seq.

602 Rwabukombe was a mayor of Muvumba commune in the Eastern province during the 1994 genocide.

603 The Tribunal was not convinced that the accused would receive fair trial if transferred to Rwanda despite the abolition of death penalty; see Prosecutor v. Kan-yrarukiga, ICTR (Referral Bench), Decision of 6 June 2008; Prosecutor v. Hategeki-mana, ICTR (Referral Bench), 19 June 2008.

604 See § 220a of the German Criminal Code (StGB).

605 See § 211 of the German Criminal Code (StGB).


anticipated lengthy trial further indicates the complexities involved in dealing with international crimes cases. However, this is understandable given the difficulties involved, such as the travelling of investigators to Rwanda, interviews in different languages, translation of available documents into German, the need for witnesses from Rwanda to travel to Germany, interpretation in court from Kinyarwanda to German or the reverse, and so many other obstacles, such as accommodation, which actually render the trial very expensive in nature. Other inconveniences and shortcomings faced include the fact that a number of witnesses from Rwanda sometimes face a cultural shock of the court proceedings and structure with which they are not familiar, which, in the end, may hamper their confidence and consequently the credibility of their testimony due to intimidation or fear and discomfort in testifying. Also, the standards of proof in developed countries’ judicial systems are sometimes different from the available evidence. For instance in regard to standards in the Rwabukombe case in Germany, eye witnesses are regularly unable to provide required documents as evidence of the suspect’s crimes, or to give exact dates and time when the crimes were committed by the suspect. It is very hard to get minutes of meetings or video clips of all facts regarding the accusations, as often demanded by the court, which is perhaps right in the context of Europe standards but not practical in Africa, where it is rare to find recorded and well-preserved evidence other than the oral testimony of witnesses and hearsay evidence.

Another challenge faced is the uncertain protection from danger or ill treatment of defence witnesses in Rwanda. And finally, the translation of documents is a difficult process because sometimes coded language is used or words in Kinyarwanda that cannot be translated within the context of their actual meaning.608

On a positive note, there are several advantages of third state prosecutions. In particular, the case at hand affirms the international criminal law principle that there shall be no tolerance of impunity of persons who committed grave human rights abuses, no matter where they may be or where the crimes were

608 Like the ICTR suspects, perpetrators frequently used euphemistic, metaphorical or otherwise coded language that is understandable to the addressees but cannot be easily translated in other languages, see G. Werle, Principles of International Criminal Law, 2nd edn, (2009), at 283, MN 771 et seq; similar challenges of use of metaphorical or coded language were faced in the ICTR Trials, see The Prosecutor v. Jean Kambaranda, Case No ICTR-97-23-S, (TC), 4 September 1998; Kambaranda v. The Prosecutor, Case No ICTR 97-23-A, 19 October 2000.
committed.\textsuperscript{609} Also, due to credible justice systems, third state prosecutions, especially in developed countries, have a reputation of respecting fair trial rights of defendants as provided for under international law and national law. Specifically, in addition to full observance of the due process rights of defendants, the German system is characterised by an independent judiciary where the trial itself would be an exemplary lesson to several other countries in conducting prosecutions under the principle of universality.\textsuperscript{610}

Unlike several countries, Germany has a pure universal jurisdiction statute, which is called the code of crimes under international law, (\textit{Völkerstrafgesetzbuch}-VStGB).\textsuperscript{611} Germany has prosecuted suspects of international crimes based on this code which covers crimes committed after its entry into force on 30 June 2002.\textsuperscript{612} For crimes committed before the entry into force of the \textit{Völkerstrafgesetzbuch}, Section 220a of the \textit{Strafgesetzbuch}, (StGB) was used in the case of genocide. According to the more recent \textit{Völkerstrafgesetzbuch}, German national courts are competent to prosecute and try alleged perpetrators of genocide, crimes against humanity and war crimes regardless of where the crimes were committed. Therefore, it is im-


\textsuperscript{611} See § 1 \textit{Völkerstrafgesetzbuch}, (2002), and before its entry into force § 6 No. 1 StGB was in use; for a comment on the \textit{Völkerstrafgesetzbuch} and its Consequences, see G. Werle and F. Jessberger, ‘Das Völkerstrafgesetzbuch,’ \textit{Juristenzeitung}, (2002), at 725-734; see also M. Inazumi, \textit{Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes under International Law}, (2005), at 22.

important for other states to learn from German practice in order to comply with the aut dedere aut judicare principle.613

Apart from Germany, there are several countries that have carried out prosecutions for genocide of Rwandans who had sought refuge in countries such as the Netherlands, France, Belgium, Denmark, Norway, Finland, Sweden, Canada and the US.614 According to information provided by the genocide fugitive tracking unit, such tremendous strides against impunity would not give breathing space to genocide fugitives.615

Importantly, by virtue of third state prosecutions, the international community shows that there is no safe haven for those who commit international crimes.616 This is necessary for deterrence and for ending impunity at the national and international level because heinous crimes which go unpun-

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614 Information from the Rwandan National Prosecution Office in Charge of the Genocide Fugitives Unit, June 2012; see examples of such prosecutions in G. Werle, Principles of International Criminal Law, 2nd edn, (2009), at 113, MN 302; see also L. Reydams, Universal Jurisdiction, (2003), at 196 et seq; Amnesty International, Universal Jurisdiction, (2001), at 86 et seq. After the recent transfer of ICTR suspects to Rwanda, several countries have either deported or extradited suspects to Rwanda for prosecution, see Charles Bandora, a genocide suspect extradited by Norway and Léon Mugesera Case currently in the High Court of the Republic of Rwanda from Canada; see also W.A Schabas, ‘International Decisions, Mugesera v. Minister of Citizenship and Immigration, November 1998,’ 93 American Journal of International Law, (1999), at 529 et seq.


ished tend to encourage continued violations of human rights.\footnote{M.C Bassiouni, ‘Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice,’ 42 Virginia Journal of International Law, (2001), at 81 et seq; R. Cryer, Prosecuting International Crimes, (2005), at 73 et seq; R. Cryer et al., An Introduction to International Criminal Law and Procedure, (2007), at 37 et seq; G. Werle, Principles of International Criminal Law, 2nd edn, (2009), at 70, MN 198 et seq.} Therefore, the issue that remains is the need for increased cooperation among states in prosecution of perpetrators of international crimes. The surrender and arrest of fugitives represents a vital form of state cooperation but a state’s unwillingness to surrender or prosecute suspects of grave crimes can become a big barrier to accountability.\footnote{A. Cassese et al., International Criminal Law: Cases and Commentary, (2011), at 557.} As put by the UN Secretary General, ‘The fact that the ICTR continues to deliver justice, with the cooperation of some states shows the reality of the new age of accountability and that international criminal justice is a testament to the collective determination to confront the most heinous crimes.’\footnote{I. R. Mugisha, ‘Obama Ki-moon Pay Tribute to Rwandans,’ The New Times Kigali, 08 April 2013.} 

Notwithstanding the above, states, investigators, prosecutors, judges, and courts of countries whose legislation incorporates this broad concept of universality, should apply it with great prudence, and only if they are certain that convincing evidence is available against the accused, moreover that states with a close link to the case are not about to prosecute.\footnote{C. Edelenbos, ‘Human Rights Violations; A duty to Prosecute?’ 7 Leiden Journal of International Law, (1994), at 5 et seq; D.F. Orentlicher, ‘Settling Accounts: The Duty to Prosecute Human Rights Violations of A Prior Regime,’ 100 New York Law Journal, (1991), at 2537 et seq; G. Werle, Principles of International Criminal Law, 2nd edn, (2009), at 70, MN 198 et seq.} In case states with a closer nexus to the crime are able and willing to prosecute as provided by the ICC complementarity principle, third states should refrain from any
prosecution to avoid conflicting jurisdictions by virtue of the subsidiarity principle.621